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AUTHORITY TO ADOPT GIVEN BY AN INVALID WILL.

Kondapalli Vijayaratnam v. *Mandapaka Sudarsana Row*; I. L. R. 48 M. 614 : 49 M. L. J. 247 (P. C.).

The tendency of the Privy Council in recent years has been in the direction of a strict interpretation and rigorous enforcement of the provisions of the Indian Statute Law prescribing formalities in connection with documents [cf. *Shamu Pattar* v. *Abdul* (1), *Jambu Prasad* v. *Muhammad Aftab Ali Khan* (2), *Amba* alias *Padmavati* v. *Srinivas Kampthi* (3), *Biswanath Prasad* v. *Chandra Narain* (4) and *Ma Shwe Mya* v. *Maung Ho Hnaung* (5)], so much so that the Legislature has had occasionally to step in to mitigate the possible hardship. [*Cf.* Act XVII of 1917 : S. 23-A of the Registration Act and Act XXVI of 1917 : The Transfer of Property Validating Act]. We feel constrained to say that the decision in *Kondapalli Vijayaratnam* v. *Mandapaka Sudarsana Row* (6) carries the rigour of formalism even further than the cases cited. A will executed many years ago and in fact registered by a competent public officer, and an adoption made some years before suit on the strength of the authority contained in that document are now set aside by their Lordships on the ground that though in form a will, the document is not, in the eye of the Law, a 'will,' and that notwithstanding its registration, it cannot avail even as an authority to adopt, because the document was presented for registration not by the widow (the donee of the power) but by some other relation who was only a legatee under the will. The conclusion is all the more regrettable in view of the fact pointed out by the Courts in India that the parties who contested the will had accepted and acted upon it

1. (1912) I L R 35 M 607 : 23 M L J 321 (P C)..
2. (1914) I L R 37 A 49 : 28 M L J 577 (P C).
3. (1921) 26 C W N 369 (P C).
4. (1921) I L R 48 C 509 (P C).
5. (1922) I L R 50 C 166 ; 44 M L J 732 (P C).
6. (1925) I L R 48 M 614 : 49 M L J 247 (P C).

for many years [see *Kondapalli Vijayaratnam* v. *Mandapaka Sudarsana Rao* (7)]. The question of the testamentary character of the document became material in the case by reason of the rule in the Registration Act insisting on the registration of a power to adopt, except when it is contained in a will. Two points were therefore raised before their Lordships, (1) whether the document was a will and (2) whether the registration which in fact had been effected was in conformity with law.

That the mere fact of a document being called a will does not suffice to give it the effect of a will for all purposes is now too well established to be doubted. [*Thirugnana Pal* v. *Ponnammal Nadathi* (8); *Jagannatha Bheema Deo* v. *Kunj Behari Deo* (9)]. We may, however, point out in passing that their Lordships were scarcely justified in making a point of the fact that their decision in *Jagannatha Bheema Deo* v. *Kunj Behari Deo* (9) was not before the High Court when dealing with the present case, because Sir John Wallis, C. J., who took part in the High Court judgment had himself laid down the same proposition when *Jagannatha Bheema Deo* v. *Kunj Behari Deo* (9) was before the High Court. See *Jagannatha Bheema Deo* v. *Kunj Behari Deo* (10). In the case under notice the document in question not only purported to be a will but did contain posthumous dispositions of property, though these dispositions could not take effect, because the executant (notwithstanding that he was aged 19) was a minor under S. 3 of the Indian Majority Act as he was under the guardianship of a Court guardian. The tenor of some of the observations in the judgment and the reliance placed on the definition of a 'will' in the Indian Succession Act would seem to suggest that in their Lordships' view every testamentary document whose dispositions are wholly void and cannot take effect must be held not to be a 'will' even for the purpose of S. 17 (3) of the Registration Act. It is, however, well established that the mere fact of the ineffectiveness of the dispositions does not take away the testamentary character of a document. There is a well-recognised distinction between the complete absence of testamentary capacity in the executant and the absence of capa-

7. (1920) 60 I C 146 : (1920) M W N 684.
8. (1920) 25 C W N 511 (P C).
9. (1921) I L R 44 M 733 : 41 M L J 648 (P C).
10. (1919) M W N 52.

city in him to dispose of the properties dealt with by the will. In England the question has arisen in another form in connection with applications for probate of wills of married women, it being formerly the rule of the English Law that a married woman had no independent testamentary power unless she was possessed of separate property. In the view of the English Courts, it was for this purpose only necessary to enquire whether she had any separate property at all so as to give her a testamentary capacity and not whether all the property mentioned in the will was property over which she had a power of disposal by will. [Cf. *Thorpe* v. *Macdonald* : *In the Goods of Thorpe* (11)].

How exactly a distinction of the above kind will be applied by their Lordships to different conceivable cases in India, it is not possible to gather from the tenor of the judgment under notice. The inoperativeness of the will in the present case no doubt arose from the minority of the executant—it was a case of absolute testamentary incapacity so that a Court of Probate would have been justified in refusing probate of the will. But take the case of a member of a Mitakshara joint family executing a will disposing of his undivided interest in the family property and also authorising his widow to adopt. If the will dealt with no other property, it would be wholly void as a 'disposition,' and if he had no separate property besides, his position will almost resemble that of the married woman under the former English Law. The owner of an impartible zamindary in this Presidency with no other personal property will be another instance of the same kind. Is it to be held in such cases that even the authority to adopt contained in the will cannot be availed of by the widow, unless the document had been registered? This contention was summarily rejected by Tyabji, J. in *Bachu* v. *Kusal Doss* (12). Though his decision as to the validity of the adoption was confirmed on the Appellate Side [*Bachu* v. *Mankore Bai* (13)] and by the Privy Council in *Bachu* v. *Mankore Bai* (14) this point does not appear to have been raised or dealt with in the appeal. The argument was 'tentatively' put forward before the Privy Council in *Venkatanarayana* v. *Subbammal* (15) and was answered by the observation that the will was executed by a testator who *at its date* could dispose of the property of which

11. L R (1878) 3 P D 76. 12. (1902) 4 Bom L R 885.
13. (1904) I L R 29 B 52. 14. (1907) I L R 31 B 373 (P C).
15. (1915) I L R 39 M 107 : 29 M L J 851.

he purported to dispose—a co-parcener came into existence in that case only by an adoption subsequent to the date of the will. This remark seems to suggest that if the other co-parcener had been in existence at the date of the will, the objection might have prevailed.

We must, however, say that it does not seem to us logical or satisfactory to base the conclusion on the presence or absence of co-parceners at the date of the execution of the document. Let us take a case where a member of an undivided family makes a will disposing of his share in joint family property but his co-parceners predecease him or he becomes divided from them : then undoubtedly the dispositions in his will can take effect and it will be strange indeed if in such a case, notwithstanding the ultimate effectiveness of the will, a power of adoption therein contained cannot be availed of in the absence of registration. Whether a will executed by a person when under age *ipso facto* becomes valid on his living beyond the age of majority does not appear to have been decided. In respect of a will made by a testator, while *non compos*, it is stated in Williams on Executors, 11th Edition (page 150) that the will does not obtain any force by the mere fact of the testator subsequently recovering his understanding—though if republished after such recovery it would become a valid will

Under the English Law as it stood before 1893, a will made by a woman during coverture, disposing of property over which she had no power of disposition during her husband's lifetime did not become effective by the mere fact of the husband pre-deceasing her, but this rule has been changed by S. 3 of the Married Women's Property Act of 1893.

There still remains the further question whether for the purposes of the application of the rule in the Registration Act, a Court will be justified in taking into account all the considerations which may be relevant in a Court of Probate. It is a well-established principle that in applying the provisions of the Registration Act the Court is only concerned with what a document on the face of it purports to be and not with its actual operation in the circumstances of particular cases. [Cf. *Ramaswami Aiyar* v. *Thirupathi Naick* (16)]. In this connection the difference between the language of the definition of a ' will ' in the Succession Act and that in the General Clauses Act is worth noticing—especially as the Registration Act itself contains no definition of a ' will ' and it is the General Clauses

16. (1903) I L R 27 M 43: 13 M L J 356 (P C).

Act definition that must accordingly govern the determination of the present question. The Privy Council cite both the definitions but they seem to proceed on that contained in the Succession Act, for the definition in the General Clauses Act does not import the 'legality' of the document. Though it is an 'inclusive' and not an 'exhaustive' definition, it will be satisfied by any writing "making a voluntary posthumous disposition of property." That a testamentary declaration by a person under age may for certain purposes be spoken of as a 'will' is indicated by the provision in S. 47 of the Succession Act itself, enacting that a father, *whatever his age may be,* may by *will* appoint a guardian for his child.

An examination of some of the provisions of the Registration Act also reveals certain anomalies and hardships likely to result from insistence on registration in such cases. Their Lordships grant that a document purporting to be a will but inoperative as such might nevertheless constitute a valid authority to adopt, if it has been duly registered. Can this concession be made effective under the Registration Act in the case of such a document executed by a minor ? If it is presented for registration *during his lifetime*, registration can be refused on the ground of his minority [S. 35 (3) (*b*)]. If it is however presented by his widow or the adopted son after his death, it may be registered (notwithstanding the minority of the executant) if the decision in *Arumugam Pillai* v. *Arunachalam Pillai* (17) is good law. This is certainly anomalous but to obtain the benefit of this anomalous rule, the executant *must die within four months* of the date of the document ; for though wills and authorities to adopt are for certain purposes put on the same footing in Ss. 40 and 41, the exemption from the time limit of four months is allowed by S. 23 only in respect of a will. On the *ratio decidendi* of the decision in *Arumugam Pillai* v. *Arunachalam Pillai* (17) a further difficulty may arise in this class of cases. As the executant was a minor, his widow and the adopted son will be minors too. Who then is to present the document for registration ? The Registration Act does not contemplate presentation by minors. *Arumugam Pillai* v. *Arunachalam Pillai* (17) proceeds on the footing that the provisions of S. 35 do not apply to a presentation under S. 40 ; it would then logically follow that S. 32 cannot apply too, so that the guardian of the minors who (by the definition in S. 2, cl. 10) can only present as a 'representa-

17. (1897) I L R 20 M 254.

tive ' under S. 32 will have no *locus standi* to present the document under Ss. 40 and 41. In *Venkatappayya* v. *Venkata Ranga Rao* (18) this difficulty was sought to be got over by an appeal to *general principles* relating to the right and duties of a guardian ; but it may well be maintained that if general principles of the Law of *Principal* and *Agent* are not available for the purposes of the Registration Law, other general principles should equally be excluded. It is noteworthy in this connection—whether the difference is intentional or not—that S. 42 (dealing with the *deposit* of wills) expressly mentions an agent, but not S. 40. In the course of the judgment under notice, the Judicial Committee observe, *in passing,* that it was not alleged in the case that the donee of the power either presented the documents herself or *gave authority for the registration.* These words could not fairly be construed as implying a *decision* that agency is permissible for purposes of S. 40. Assuming that a guardian may present the document for registration, difficulties may also arise as to the person competent so to act. After the decision in *Amba* alias *Padmavati* v. *Srinivas Kampthi* (3) it is doubtful if the natural father of the adopted boy has any *locus standi* in the matter. The legal guardian (the adoptive mother), being herself a minor, cannot act as a guardian—and her parents too must, according to the same judgment, have lost their right to act as her guardian after the marriage. Her father-in-law may perhaps be entitled to act as her guardian and, in his absence, the deadlock can only be obviated by invoking the aid of the Court to appoint a guardian—and even this must be done within the time allowed by the Registration Act for presentation. [See *Venkatappayya* v. *Venkata Ranga Rao* (16)].

It must be admitted that the hardships and anomalies above referred to are unavoidable in the case of a document which on the face of it purports to be nothing more than an authority to adopt ; but there is no reason or justification for adding to the scope of such hardship or anomaly—especially when it is by no means clear why for purposes of registration the Legislature has thought fit to insist on this distinction between wills and authorities to adopt. It must also be remembered that when a document purports on the face of it to be a will, the conduct of the parties with reference to it is likely to have been influenced by the same assumption.

3. (1921) 26 C W N 369 (P C).
18. (1919) I L R 43 M 288 at 306 : 38 M L J 149.

A BILL

FURTHER TO AMEND THE LEGAL PRACTITIONERS ACT, 1879.

Whereas it is expedient further to amend the Legal Practitioners Act, 1879, for the purposes hereinafter appearing ; It is hereby enacted as follows :—

1. This Act may be called the Legal Practitioners (Amendment) Act, 192 . Short title.

2. For the definition of "tout" in S. 3 of the Legal Practitioners Act, 1879 (hereinafter referred to as the said Act), the following definition shall be substituted, namely :— Amendment of section 3, Act XVIII of 1879.

" 'tout' means a person—

(*a*) who procures the employment in any legal business of any legal practitioner, in consideration of any remuneration moving from such practitioner or from any person interested in such business ; or who proposes to procure the employment in any legal business of any legal practitioner to such legal practitioner or to any person interested in such business, in consideration of any remuneration moving from either of them ; or

(*b*) who habitually frequents the precincts of Civil or Criminal Courts or revenue-offices or railway stations, landing stages, lodging places, or other places of public resort for the purposes of such procurement."

3. In S. 36 of the said Act,— Amendment of section 36, Act XVIII of 1879.

(*a*) in sub-section (1) after the word "satisfaction" the words "or to the satisfaction of any subordinate Court as provided in sub-section (2A)" shall be inserted ;

(*b*) to sub-section (1) the following *Explanation* shall be added, namely :—

"*Explanation.*—Evidence of general repute includes a resolution passed by a majority of not less than two-thirds of the members of an association of persons entitled to practise as legal practitioners in any Court or revenue-office, declaring that any person is or is not a tout" ;

(*c*) after sub-section (2) the following sub-section shall be inserted, namely :—

"(2A) A Court, Judge, Magistrate or officer empowered under sub-section (1) to frame and publish a list of touts may send to any Court subordinate to such authority a list of persons alleged or suspected to be touts ; the subordinate

Court shall thereupon hold an inquiry into the conduct of the persons mentioned in such list, and shall report whether any such person has been proved to its satisfaction to be a tout, to the authority by which the list was sent ; and that authority, where any such person is proved to the satisfaction of the subordinate Court to be a tout, shall include the name of such person in the list of touts framed and published by that authority."

(*d*) after sub-section (5) the following sub-section shall be inserted, namely :—

" (6) Any person whose name is included in any such list who acts as a tout shall be punished with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both. "

STATEMENT OF OBJECTS AND REASONS.

In their report the Bar Committee made the following observations in regard to touting :—

" We feel that our report would not be complete without some reference to an evil which was brought prominently to our notice in the course of our enquiry. The evidence which we have received leaves no doubt that touting of various kinds prevails in most parts of India. The law with reference to touting was strengthened in 1896, but has proved entirely ineffective. The plain fact is that unless the legal profession assists the Courts to suppress touts little can be done by way of legislation."

The Civil Justice Committee also referred to the fact that the employment of touts is the evident and immediate cause of many false claims and defences and of much waste of time in Courts.

The question of amending the law so as to permit of the effective suppression of touting was considered at length by the Government of India in consultation with the Local Governments and with judicial authorities immediately before the war, and it was only because of the war that legislation was not then undertaken. The Government of India consider that in view of the observations of the two Committees referred to above, in regard to the inefficiency of the present law and the evils attendant upon touting, legislation on the matter should no longer be delayed. The Civil Justice Committee have made definite recommendations for the amendment of the law

and these have been considered with the conclusions which had been arrived at by the Government of India in 1913 to 1915. The result of that consideration is embodied in the present Bill. Briefly, it is proposed to amend the law in the four following respects :—

(*i*) to extend the definition of a tout in S. 3 of the Legal Practitioners Act, 1879, so as to include firstly, persons whose remuneration comes from any person interested in any legal business as well as persons whose remuneration comes from the legal practitioner himself and secondly, persons who habitually frequent places of public resort for the purpose of procuring the employment in any legal business of any legal practitioner ;

(*ii*) to permit the receipt of a resolution passed by a majority of not less than two-thirds of the members of a Bar Association as evidence of general repute ;

(*iii*) to enable the Courts and authorities who may now frame and publish lists of touts to cause enquiries to be held by a subordinate Court, which enquiries, if the subordinate Court concludes that the persons in question have been proved to be touts, will lead to their inclusion in the list of touts framed and published under S. 36 of the Legal Practitioners Act ; and

(*iv*) to penalise any person whose name has been included in a list of touts who continues to act as a tout.

In regard to the last point it will be observed that under S. 36 of the Legal Practitioners Act the authorities are only empowered to exclude from the precincts of the Court persons named in the list of touts. With the extension of the definition of a tout to persons who frequent places of public resort other than Civil or Criminal Courts or revenue offices penal provision is required as was in fact recommended by the Civil Justice Committee.

The 21*st August*, 1925. A. P. MUDDIMAN.

In view of the importance of the question dealt with in the above bill, we make no apology for publishing the following communication [*Ed.*] :—

It may be easy to diagnose an evil, but it is another thing to devise a remedy to meet it. In no case is that more painfully evident than in the case of the attempt to stamp out the evil of touting. There is no winking at facts. Commission

after Commission has detailed the evil. A quarter of an hour's visit to the corridors of the Presidency Small Cause Court at Madras, for instance, will be an eye-opener to any possible sceptic. The Bar Committee, while deprecating the evil and the unwholesome extent to which it exists, eating as a very cancer into the vitals of one of the noblest professions, is yet candid enough to confess that legislation cannot be any effective cure unless the legal profession itself makes a real move in the matter, They should advance beyond the stage of "Barkis is willing.........." All the *bona fides* in the world and a wholesale lip condemnation of this evil by the Bar itself is not going to eradicate it unless the general sense of the Bar expressed in its corporate bodies like Bar Societies and Law Associations will induce those learned bodies to translate their sentiments into action by hauling up the delinquents.

Truths may be painful to hear, but facts are none the less true. It is a well-accepted principle of Economic Law that the supply will adjust itself to the demand. If there is no purchaser of contraband goods, smuggling will be at a discount. If there be no bribe-takers, there will be no bribe-givers. Equally, if there be nobody to encourage touts, and get engagements from them, this class of undesirables must meet with a natural death and become extinct without the intervention of Legislators or Courts. Overture ill becomes a Gown, be the wearer a member of the sterner or the fair sex. Hence, while advertising—and an amount of solicitation of custom—is condoned in several of even of the Learned Professions, we find the general etiquette of the Bar,—and Law has petrified the convention—is that there should be no solicitation on the part of the member thereof of briefs, though one is left to wonder whether it was always so, from the rather suggestive expression "solicitor" which smacks of such an act. Whatever may be the origin of the principle and however the legal practitioner might have been fed in the days of yore, and whatever vicissitudes might have happened to the lawyers, who from their being the honorary exponents of law, and honorary chivalrous champions of the weak, have become a class of persons willing to plead a cause or do technical work for a fee, this much is accepted on all hands that it is derogatory for a member of the profession to employ a broker to bring custom. Keen competition and a struggle for existence might have lowered the standard of morals ; or by temperament, all may

not come to live up to that high moral plane. For, if professional morals were so high, the existence of this army of touts, who have made their presence felt by the two Imperial Commissions, would be a riddle. Thus, it goes without saying that if anything effective is to be done in the matter of stamping out this noxious weed, that flourishes in the heart of one of the noblest of professions, the profession itself must gird up its loins and see that the stigma is removed for ever and its prestige safeguarded. It is a sad and lamentable exhibition of want of nerve on the part of the Bar Associations not to have by this time combined to eradicate the evil, root and branch, but let it flourish till the Legislature had to intervene and make it penal for a tout to persist in touting. Even till now, there was enough provision in the Legal Practitioners Act to punish the practitioner who will quietly stifle his conscience and sacrifice principle at the altar of Mammon. Ss. 13 and 22 of the Legal Practitioners Act make it unprofessional conduct for a legal practitioner to employ the service of a tout. In spite of this, we may pause and ask how many members have been so hauled up for professional misconduct ? The absence of such a roll of persons, who have been booked, might mean only one of two things : either there are no touts and no touting, or that in spite of the penal clause, touting flourished and is not detected. It is certainly not the first alternative, though right glad will I be if I were wrong. But the fact is there and has received the recognition of a couple of Commissions. Touting exists. The result is that the other alternative is true, that is, the existence of a penal provision enabling Courts to punish legal practitioners who stoop to employ the touts did not suffice to detect the offence. Touting flourishes merrily by the Legal Practitioner paying a discount or commission or remuneration to the person who books a remunerative engagement for him. Till now, the person who gave that "bribe" was punished. That has not proved effective and it has to be seen whether the penalising of the taking of the bribe also is after all going to prove a more deterrent punishment.

In the first place it is no easy task to define exactly who a tout is. This class comprises gentlemen of a *variorum* kind, a class of non-descript individuals, who can be described as idlers attending Courts and as honest citizens of the land taking a pride in watching the Courts of Justice working, x-vakil gumasthas, dismissed Policemen, Law Agents, Brokers,

Scribes, Petition-writers, professional witnesses, and generally persons plying their trade in their own capacity as pseudo-philanthropists who profess to put inexperienced litigants in the way when they find themselves perplexed in the maze of litigation. How are you going to define this fraternity, as slippery as the eel, and pen them within the tight garters of a definition? They know enough of law to avoid its stings and they also know its pretty liberal loop-holes, as Legislature, true to tradition always includes some safety valves, vent ways and emergency exits in the construction of the edifice of an Act. They are further fairly educated persons, though men of the world and avoid its dangers and are not easily caught napping. Thus it is no easy affair to cast the net to catch all these professionals. It must be conceded that the soul of a definition of a tout must be his act of procuration of the services of a legal practitioner for a remuneration proceeding from either the client or the pleader. When the pleader is made an abettor of the offence, and finds the Damocles sword of a charge of professional misconduct hanging over his head, it will be very difficult to produce any proof of remuneration proceeding from that quarter. The penal provisions will rarely be brought into operation on account of the great difficulty, if not the practical impossibility of getting adequate proof. Human nature being what it is, we may presume that all men are not Samaritans and are not likely to make a hobby of supplying briefs to legal practitioners. Therefore, the definition of touts may be amended to the effect that the habitual procuration of briefs may be touting.

The Civil Justice Committee, consisting of an able body of Lawyers and Judges, have touched this fact also. Of course, they have generally indicated the directions in which legislation might proceed to strengthen the hands of the Court to combat the evil successfully. But it remains to be seen what practical measures are to be adopted and how far they are going to achieve the object in view. Generally it may be noted that Bar Associations should be given a legal recognition to act as a quasi-judicial body in the matter of initiating proceedings and prosecuting them. And Subordinate Courts, especially, where this undesirable system should obviously be expected to flourish, should be given adequate powers to deal with it.

But the main remedy for this evil should proceed from the Bar itself. Unless the general moral tone of the profession asserts itself, and refuses to tolerate the aberrations of

individual members thereof, and the Bar as a whole exhibits that stern sense of duty for the good and reputation of the profession as a whole, without exhibiting that squeamishness, forbearance and neutrality, worthy of a better purpose, and relentlessly hauls up a tout, with the concomitant necessity to expose, and if need be, punish his " Patron, " I am afraid this system cannot be easily rooted out.

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SUMMARY OF ENGLISH CASES.

BORLEY *v.* OCKENDEN, (1925) 2 K. B. 325.

Workmen's compensation—" Arising out of and in the course of employment"—Taking work home contrary to orders —Accident at home while doing work—Compensation—Right to.

A boy employed in a boot-making business took home contrary to the orders of the authorities a pair of boots for the purpose of repairing them and thus improve his own skill. While doing the repairs at home, he injured an eye with an awl, and it had to be removed. He claimed compensation from his employers. *Held,* the injury did not arise " out of and in the course of employment " within the meaning of the Act and he was not entitled to recover compensation.

WARREN *v.* WARREN, (1925) P. 107.

Divorce—Adultery—Confession of wife—If admissible in evidence.

In a petition for divorce by a husband, a confession by the wife that she had committed adultery and that the child born was the result of the same is admissible. *Russel* v. *Russel,* (1924) A. C. 687, only excludes evidence of either spouse as to non-access which would bastardize the issue, and a belief by the wife that the child born is the result of adultery does not rebut the legal presumption of paternity in the husband, in the absence of proof of non-access.

In re HACK : BEADMAN *v.* BEADMAN, (1925) 1 Ch. 633.

Will—Construction—Devise of copyhold—Heir-at-Law —Rule in Shelley's case—Applicability.

In the absence of a special custom of descent in a manor, copyholds are governed by the ordinary law of descent and a devise of a copyhold estate "to *X* and after his death to his heir-at-law" does not exclude the rule in Shelley's case. *X* would in such a case be entitled in customary fee simple for an estate to him and his heirs according to the custom of the manor.

In re FIELD : SANDERSON *v.* YOUNG, (1925) 1 Ch. 636.

Will—Construction—Trustee to pay rent and perform covenants to repair—Equitable tenant for life—Receipt of rents after death of trustee—Liability to repair—Acceptance of benefit—Effect of.

In exercise of the power conferred by a will, *X* appointed trustees to take possession of certain leasehold estates, pay the rent fixed and after doing the repairs contained in the covenants in the lease, pay over the balance to *Y* or permit *Y* to receive the rents. After the death of *Y* the properties were to be held in trust for the daughters of *Y*. Even during the lifetime of *Y* the last of the surviving trustees died and as his legal personal representatives refused to have anything to do with the trust, *Y* began to receive the rents herself. She, however, failed to keep the leasehold estate in repair, contrary to the covenants in the lease. After the death of *Y*, her daughters who were the ultimate beneficiaries sued the personal representatives of *Y* for damages for breach of the covenant to repair. *Held,* the principle that a person can only take a benefit *cum onere* applied and *Y* having full knowledge of the primary trusts affecting the estate was bound to perform the same. Performance of the covenant to repair being a condition precedent to obtaining the benefit of the rent, her estate was liable. (1924) 1 K. B. 826 ; 54 L T. 105 referred to.

In re DAVIES : SCOURFIELD *v.* DAVIES, (1925) 1 Ch. 642.

Will—Construction—Specific gift of proceeds of sale—Contrary intention—Wills Act, 1837, *S.* 24.

A testator by his will made a devise in favour of his wife of certain properties, impleading among other things "moneys representing the proceeds of sale of such parts of the said estate as have been sold". Between the date of the will and his death, certain contracts for sale were entered into by him, some of which were completed by him and others by his execu-

tors. The question arose whether proceeds of the sale realised after the date of the will passed to her. *Held,* the true principle to apply is that if a testator bequeaths property which is capable of increase or decrease and describing such property by a generic term, such as " proceeds of sale " he must be taken to have known that with reference to that property his will would be read as if it had been executed immediately before his death. The mere use of the past tense does not amount to a " contrary intention " within the meaning of S. 24, Wills Act.

In re NORTHCLIFFE : ARNHOLZ *v.* HUDSON, (1925) 1 Ch. 651.

Will—Covenant to settle after-acquired estates—Confirmation by codicil—Effect of—Republication.

A clause in a settlement deed contained a covenant to the effect that any freehold estate purchased by the settlor thereafter would be subject to the terms of the settlement. He subsequently acquired freehold estates and by a will executed subsequently confirmed the settlement, and later after acquiring some other freeholds executed codicils in each of which the will was confirmed. *Held,* by confirming the will in the two codicils, the effect was to republish the will and the freeholds formed part of the settlement.

THE SOCIETY OF MOTOR MANUFACTURERS AND TRADERS, LTD. *v.* MOTOR MANUFACTURERS AND TRADERS MUTUAL INSURANCE CO., LTD., (1925) 1 Ch. 675.

Trade name—Similarity of name—Injunction restraining use of—Risk of confusion.

A Society having for its object the promotion and encouragement of the motor trade generally, was registered in the name of " The Society of Motor Manufacturers and Traders, Ltd. " Some years later, a Company whose business was to effect insurance against risks connected with motor vehicles was incorporated under the name of " Motor Manufacturers' and Traders' Mutual Insurance Company, Ltd. " The older Company sued for an injunction restraining the other from carrying on its business under any name containing the words " Motor Manufacturers and Traders ". There was no evidence to show fraud or tangible risk owing to similarity of names. *Held,* the plaintiffs were not entitled to the relief claimed against the defendants.

Per Lawrence, J. (and affirmed by the Court of Appeal).—The question must be decided by an appeal to the eye and ear coupled with a proper consideration of the surrounding circumstances and the evidence of persons coming in contact with the plaintiff Society's name. It is well established that a Court of Equity will protect business reputation enjoyed by a person against tangible risk or probability of injury; but where there is no fraud and a Company has adopted a purely descriptive name, the onus of proving that another Company by adopting a somewhat similar descriptive name is exposing the credit or business reputation of the other is a very heavy one.

REX *v.* BATEMAN, 94 L. J. K. B. 791.

Criminal Law—Medical practitioner—Manslaughter—Negligence—Test of liability—Standard of skill and care.

If a medical practitioner holds himself out as possessing special skill and knowledge and he is consulted on behalf of or by a patient, he owes a duty to him to use due caution, diligence, care, knowledge and skill in undertaking the treatment. No contractual relation is necessary, nor need the service be for reward. The law requires a fair and reasonable standard of care and competence. If death is caused by indolence or carelessness, it will not avail to show that the medical practitioner had sufficient knowledge; nor will it avail to prove that he was diligent in attendance, if the patient has been killed by gross ignorance and unskilfulness. Where incompetence is alleged he cannot claim to be measured by any lower standard than what is applied to a qualified man. To support an indictment for manslaughter the jury must be satisfied in addition that the negligence or incompetence went beyond a mere matter of compensation and showed such utter disregard of the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

In trials for manslaughter by negligence, it should be impressed on the jury that the issue is not negligence or no negligence, but felony or no felony.

GLICKSMAN *v.* LANCASHIRE AND GENERAL ASSURANCE Co., 94 L J K B 797.

Insurance—Burglary—Policy invalid in cases of concealment and untrue statements—Concealment of subject-matter—Materiality of—Burden of proof.

A policy of burglary insurance was issued on the express condition that it would be void if obtained by any misrepresentation, concealment or untrue averment of facts. One of the questions which the proposer had to answer was if any company had declined to effect or renew the burglary insurance. To this an answer substantially untrue was given. *Held*, the omission to inform the insurer of the true state of things was a concealment which rendered the policy void. In such cases the burden of proving absence of concealment is on the person who claims under the policy.

THE CHEKIANG, 94 L J P D & A 51.

Shipping—Collision—Measure of damages—Principles applicable—Non-profit earning vessel.

The damages recoverable from a wrong-doer in cases of collision at sea must be measured according to the ordinary principles of the common law. Where a shipowner claims damages against a single tortfeasor for damage done to his vessel by the negligence of the tortfeasor, the considerations that should guide the Court are the same as if a collision had taken place on land between vehicles belonging to the same class of owners. In both instances the plaintiff must prove his case and must, within the accepted rules, establish the claim for damages which he sets up.

The fact that the vessel damaged is a non-profit earning vessel is no reason why damage should not be awarded to the owner as against a tortfeasor.

JOTTINGS AND CUTTINGS

Lord Carson—In the *Daily Telegraph* of the 3rd inst., Sir James O'Connor, late a Lord Justice of Appeal in Ireland, gives an interesting impression of that figure predominant in the present generation of lawyers, Lord Carson. " He has great qualities that made him possibly the first advocate at the English Bar...... A knowledge of human nature, an instinct in the detection of falsehood and a tenacity in following up a clue made him a master in the art of cross-examination. . . He has a real sense of proportion, a priceless quality, indispensable to legal success. His arguments were logical, well-balanced, never lop-sided. " We may recall that Lord Carson dissented, in company with Lord Sumner, from the startling judgment of the House of Lords, last year, in the case which is at once a *cause celebre* and a leading authority : *Russell v.*

Russell. Thereby, as many think, he showed a continuance of those last-mentioned faculties which, as Sir James observes, he displayed as advocate. Later it is said : "In the Arthur Balfour days he was depicted in *United Ireland* as a ghoul. The influence of this was upon me when, as a boy, I saw him in Wexford Court-house prosecuting Edward Welsh, of the *Wexford People.* He was to my mind all that is evil and forbidding; but in truth there is nothing sinister in his appearance at all. He has a keen, hatchet-like face, which lends itself to caricature, as strong faces do." Whatever of sympathy or antipathy Sir James' observations on the political aspects of his subject may arouse, no reader will contend that the foregoing is not well-observed. If it is not inept to comment upon a man's face while he is still living, we may venture the remark that Lord Carson's has always been profoundly interesting. It is difficult to say which most intrigues those who regard it, the outstanding strength of it or the underlying kindness ?

—*The Law Journal,* September 12, 1925, p. 785.

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Sea Bathing.—With reference to the article on "Sea Bathing" in a previous issue (p. 749), a correspondent calls attention to S. 193 of the Law of Property Act, 1925, and gives his confident opinion that, when it comes into force on January 1, 1926, it will sweep away the majority decision in *Blundell* v. *Catterall* (1821, 5 B. & Ald. 268), together with *Brinckman* v. *Matley* (1904, 2 Ch. 313), and all other cases in denial of a public right of bathing off the foreshore. The section in question gives the public "rights of access for air or exercise" to common land or "manorial waste." If, then, the foreshore is manorial waste, any member of the public can proceed thither, divest himself or herself of superfluous clothes the better to enjoy the right of air (subject always to the overriding laws of decency), and, having so proceeded, walk into the sea in pursuance of the right of exercise. The chain is therefore complete, subject to the question whether the foreshore is "manorial waste." As to this, reference may be made to *Attorney-General* v. *Hammer* (1858, 27 L. J., Ch. 837). In his judgment in that case Baron Watson said (p. 840) : "The word 'waste' means desolate or uncultivated ground, land unoccupied, or that lies in common. This is the plain and common acceptation of the word, and undoubtedly land between high and low watermarks falls within this signi-

fication. . . again, in the description of land or manors, the terms 'lord's waste' or 'waste of the manors' are well known. The true meaning of 'waste,' or 'waste lands," or 'waste grounds of the manor,' is the open, uncultivated and unoccupied lands parcel of the manor, or open lands parcel of the manor, other than the demesne lands of the manor." The Crown, as lord of a manor, having granted coal-mines within the waste grounds of the lordship, he therefore concluded that mines below the foreshore passed under the grant. The case is authority, if authority be needed, that the foreshore up to the high-water-mark is waste land.

—*The Law Journal,* September 12, 1925, p. 786.

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The Philosophy of Law and the Ex-Solicitor General.—*En passant,* by the way, we notice that Sir Henry Slesser figures prominently in the Council of the new Institute of Philosophical Studies, recently founded under the auspices of the Master of Balliol, to promote the serious study of philosophy in England. We see that the Institute intimates its intention of including the philosophy of politics and the philosophy of law amongst the branches of metaphysics that it is concerned in promoting. We fancy that in this we see the hand of Lord Haldane and of Sir Henry Slesser, both of whom have given to the world serious treatises on metaphysics. Lord Haldane has produced "The Pathway of Reality," and two works on the Theory of Relativity, but from the standpoint of Platonism or rather of Hegelian Idealism, whereas Sir Henry Slesser's "Essay on Ontology," published a decade or thereabouts ago, belongs rather to the Neo-Scholastic and Neo-Aristotelian School of realists. The Philosophy of Law, by the way, is a subject which lawyers, academic as well as practical, have too much neglected in this country. The only recent work on the subject, so far as we know, produced by any English teacher of law, is Professor Montmorency's short essay on the "Natural History of Law," published two or three years ago by the Oxford Clarendon Press.

—*The Law Journal,* October 3, 1925, p. 827.

BOOK REVIEWS

PLEADINGS IN INDIA WITH PRECEDENTS, by Walsh and Weir. Ram Narain Lal, Allahabad. Price Rs. 5.

This small book on the drafting of pleadings in India giving precedents written by Mr. Justice Walsh of the Allahabad High Court and by Dr. Weir, Professor of Law

in the Allahabad University, with an introduction by Sir Grimwood Mears, Chief Justice of the Allahabad High Court, is bound to arrest the attention of the legal profession in this country. The necessity of a book on this subject has long been felt and an authoritative exposition of the principles of pleadings with precedents by the distinguished authors is bound to be of great value. The book is modelled in some measure on the well-known treatise of "Bullen and Leake," although it is not so exhaustive and the references to cases are not so full. The book is written in the lucid style of Mr. Justice Walsh with which we are so familiar and which is exceedingly pleasant reading ; and we would recommend a study of the book by all lawyers and even non-lawyers interested in the subject.

THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, by M. Krishnamachariar, M. A., M. L., PH. D. P. R. Rama Aiyar and Company. Price Rs. 4-8-0.

We welcome the publication of the commentaries on the Madras Hindu Religious Endowments Act (I of 1925) by Dr. M. Krishnamachariar with an introduction on the subject. This highly controversial piece of legislation has attracted very much attention both of lawyers and laymen. Indeed its validity is being tested in the Courts of Law. This commentary on the Act by Dr. Krishnamachariar with whom we are already acquainted as a legal writer of note will, we are sure, be found of great use in the thorough understanding and working of the Act. The learned writer has given references to the English and Indian decisions in appropriate places. Appendix A gives the statement of objects and reasons, the report of the Select Committee, and the message of the Governor remitting the Bill. Appendix B gives the Religious Endowments Act of 1863 and other connected measures.